

MARATHON OIL CO.

IBLA 89-434, 90-2

Decided June 18, 1991

Consolidated appeals from decisions of the Minerals Management Service affirming the assessment of late payment charges. MMS 88-0215-O&G and MMS 88-0229-O&G.

Affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Oil and Gas Leases: Royalties: Payments

Where more than 6 years have passed between the payment of Federal oil and gas royalty (and the generation of relevant documentation concerning the royalty) and the institution of an audit concerning the timeliness of the royalty payments, the time for the lessee to maintain records concerning the royalty has expired under 30 U.S.C. § 1713(b) (1988).

2. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Oil and Gas Leases: Royalties: Payments

Where a lessee's successor in interest asserts that a lessee's admitted late payment of royalty was excused because the lessee was unaware that royalty in kind was no longer being taken and that royalty in value payments were therefore due, but the Government is able to show by contemporary evidence that the lessee did receive timely notice of the termination of the royalty in kind contract, MMS' decision imposing late payment charges for the lessee's failure to pay royalty timely is properly affirmed.

APPEARANCES: Keith L. Bradford, Esq., Kirby J. Iler, Esq., Findlay, Ohio, for appellant; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., Howard W. Chalker, Esq., George Fishman, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Marathon Oil Company (Marathon) has appealed two decisions of the Assistant Director for Program Review, Minerals Management Service (MMS), affirming the assessment of late payment charges for Federal oil and gas lease royalty payments.

In 1988, the State of Wyoming Auditor's Office (State) reviewed royalty payments made in January 1982 by Husky Oil Company (Husky), Marathon's predecessor-in-interest in several oil and gas leases, to the U.S. Government Royalty Accounting Office in Casper, Wyoming. ^{1/} On March 22, 1988, the State notified Marathon of potential late payment (interest) charges resulting from Husky's alleged late payment in January 1982 of royalties for production from June 1980 through December 1981 on eight Federal oil and gas leases. Subsequently, by orders dated May 23 and 25, 1988, the Royalty Compliance Division, Royalty Management Program (RMP), MMS, concurring with the State's findings, assessed late payment charges for these eight leases. See Appendix.

The details of the alleged late payment are not in dispute: Husky did not submit a cash royalty payment for production from these leases for June 1980 through December 1981 until January 28, 1982. At that time, Federal oil and gas lease royalty matters were supervised by the Conservation Division, U.S. Geological Survey, Department of the Interior (GS). In January 1982, Husky filed Rental and Royalty Remittance Advice forms (GS Form 9-614-A) for each lease, each bearing a notation that it was an "amended report." ^{2/}

The late payments were assessed against Marathon because, according to MMS, Husky should have paid the royalty in the months prior to January 1982. That is, as of Husky's payment in January 1982, the royalty was already past due. As discussed below, Marathon has questioned whether Husky's admittedly late payment was excused.

Marathon separately appealed RMP's two orders to the Director, MMS, and its appeals were docketed there as MMS 88-0215-O&G and MMS 88-0229-O&G. By decisions dated December 13, 1988 (in MMS 88-0229-O&G), and July 14, 1989 (in MMS 88-0215-O&G), the Assistant Director for Program Review, MMS, affirmed RMP's assessments of late payment charges. Marathon filed separate notices of appeal from MMS' two decisions, which were separately docketed as IBLA 89-434 (MMS 88-0229-O&G) and IBLA 90-2 (MMS 88-0215-O&G). In view of the similarity of these cases, they are hereby consolidated for decision.

Marathon argues in its statement of reasons (SOR) that it is logical that GS did not assess late payment charges against Husky in 1982 because GS was aware of facts that justified Husky's delay in making payment. Citing MMS Payor Handbook § 3.090.20 (February 1982), Marathon notes that the Department recognizes that late payment charges will not be assessed in the following situations: (1) unit revisions (that is, according to Marathon,

^{1/} Marathon states that it acquired Husky in 1984.

The State's audit was made pursuant to authority granted by MMS under section 205 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1735 (1988).

^{2/} GS Form 9-614-A contains a box, checked by Husky, denoting that the report was an "amended report." See NTL-1, Sec. IX, 42 FR 4550 (Jan. 25, 1977).

retroactive contractual modifications, tax reimbursements, etc.); (2) action by Federal agencies (that is, again according to Marathon, approving communitization agreements, delayed notification of royalty-in-kind elections, or terminations and retroactive price adjustments); and (3) retroactive transportation or manufacturing allowances, etc. ^{3/} Based on that section, Marathon argues that the reason for the late payment is critical in determining whether a late payment charge may properly be assessed.

Marathon also notes in its SOR that the MMS Royalty Remittance Advice forms concerning Husky's payment in January 1982 did not indicate the reason the payment was late. Marathon indicates that, according to former Husky employees, it was the practice of Husky when filing amended reports to attach letters stating the reasons for the adjustment or delayed payment. According to Marathon, it is no longer possible to locate those letters or otherwise determine what the reasons were, owing to the length of time between the late payment in January 1982 and the assessment of the late payment charge in March 1988. More generally, Marathon asserts that, due to MMS' delay of more than 6 years (from January 1982 to March 1988) in bringing this claim, it (Marathon) is unable to determine the facts surrounding Husky's January 1982 royalty payments and thus cannot defend itself here. Marathon implies that it cannot be held responsible for the apparent loss of documents, in view of the 6-year limit on a lessee's obligation to maintain lease records provided by section 103 of FOGDRA, 30 U.S.C. § 1713(b) (1988), as implemented in Departmental regulations 30 CFR 212.50 and 212.51(b).

Marathon also argues that the assessment of late payment charges is barred by the 6-year statute of limitations established by section 307 of FOGDRA, 30 U.S.C. § 1755 (1988), and the general statute of limitations for collection of money damages by the United States. 28 U.S.C. § 2415(a) (1988). Finally, Marathon generally asserts that standards of fundamental fairness compel the application of principles of equity, including laches, against MMS to bar the claim.

The Assistant Director had previously rejected these arguments in his decisions, ruling that the payments were not timely, as they were not made "by the last day of the month next following the production month" as required by NTL-1, 42 FR 4546 (Jan. 25, 1977), stressing that this provision applied to all royalty payments "without exception." 42 FR 4549 (Jan. 25, 1977). ^{4/} He held that Marathon failed to meet its obligation

^{3/} Marathon cites to the MMS Payor Handbook as of February 1982, which is after the period in question. We are unaware of any similar provision in the GS Conservation Division Handbook for the period in question, but there may have been such.

^{4/} MMS also cited Departmental regulation 30 CFR 218.50 (1987). Of course, this regulation is inapplicable, having been promulgated on Sept. 21, 1984, long after the time in question here. See 49 FR 37346 (Sept. 21, 1984).

The regulations that were in effect between June 1980 and January 1982 do not expressly require the monthly filing of royalty reports, but

to support its allegations that there were extenuating circumstances justifying the late payment; that the equitable relief sought by Marathon was not available, as the Government cannot be estopped from asserting its statutory rights absent a showing of affirmative misconduct, not made in this case; that the 6-year statute of limitations set out in section 307 of FOGRMA, supra, did not apply because the late payment charges sought were not "penalties" within the meaning of that section; and that the general 6-year Federal statute of limitations, 28 U.S.C. § 2415 (1988), "raises no issue within the scope of this administrative proceeding" as to the validity of Marathon's underlying obligation to pay late payment interest. Finally, he rejected the suggestion that delay of more than 6 years in instituting the audit harmed Marathon by making records unlocatable, ruling that there was no dearth of information regarding the transaction in question fully documenting the existence of the late payment.

Marathon also filed with us an Additional Statement of Reasons (Additional SOR) indicating that it had located additional information that may shed light on the reasons for Husky's delayed royalty payments, specifically, copies of the worksheets that were apparently prepared by Husky when it completed the Rental and Royalty Remittance Advice forms (Forms 9-614-A) filed with GS in January 1982 (Additional SOR, Exh. B). Marathon also filed copies of three of Husky's internal memoranda from October 1981 and January 1982 concerning certain contracts under which the Government was evidently taking royalty oil in kind from the leases in question, as well as copies of letters from GS to Marathon (but not to Husky) from 1979 and 1980 giving notice of the implementation and cancellation of some of these contracts (Id., Exh. D).

Although MMS' case record does not identify the oil and gas lease property involved here beyond providing the numbers of the leases, Marathon indicates that these leases are part of the "North Embar Tensleep (NET) participating area" of the "Oregon Basin Unit Area" (Additional SOR at 2; Exhs. B, C, and D). 5/ We infer from the information provided by Marathon that the situation with the NET property was as follows from prior to June 1980 through January 1982: Up until June 1, 1980, the Government was taking royalty in kind from the "Oregon Basin Unit Area (North Embar Tensleep Participating Area)," inter alia, under royalty oil contract No. 14-08-0001-14344 (Additional SOR, Exh. D: GS Letters dated Oct. 25, 1979, and Apr. 25, 1980). Under that contract, Little America Refining Company evidently received royalty in kind oil from the leases on behalf of the Government. The percentage of royalty in kind that was taken is not clear. As of June 1, 1980, the contract with Little America was terminated.

fn. 4 (continued)

that requirement may nevertheless be inferred from 30 CFR 221.62 (1980), as interpreted by NTL-1. See also 30 CFR 200.1(g)(5) (1980).

MMS also cited the terms of the leases in question, but its case record does not contain these leases.

5/ This inference is drawn from the use of the letters "NET" on some of the worksheets prepared by Husky, which also bear (in Column 7) the lease numbers of all the leases involved herein.

The Government evidently replaced royalty oil contract No. 14-08-0001-14344 with at least two new royalty in kind purchase contracts affecting these leases. The material filed by Marathon refers to a contract (no serial number is apparent) with the Wyoming Refining Company evidently effective July 1, 1980, for 24.61% of the Government's royalty oil (Additional SOR, Exhs. B, C). 6/ Another royalty in kind purchase contract affecting these leases, No. 14-08-0001-18190, with Little America Refining for 14.92% of the Government's royalty oil, was placed into effect on September 1, 1980, but was terminated effective November 1, 1980 (Additional SOR, Exhs. B and D: GS Letters dated Aug. 1 and Sept. 29, 1980).

Marathon states that it was unable to locate any letters from GS to Husky notifying it of the June 1, 1980, termination of the royalty in kind contract or other changes affecting how royalty in kind was being taken. Marathon indicates that no such letters were received by Husky, pointing to Husky's internal memorandum dated January 7, 1982, which states:

As per a telephone conversation Allan Jolley this date, it was brought to our attention that the USGS cancelled its contract to take its oil royalty in kind from various properties in the Oregon Basin, effective June 1, 1980.

In reviewing the files, we found memos from Alan Jolley to Susan Shea dated October 19, 1981 and October 26, 1981, wherein he requested we review our files to confirm payment should be made to USGS effective June 1, 1980.

According to our Division Order files, there is no record of receiving letters dated October 25, 1979, [April] 25, 1980 and August 1, 1980 from the USGS advising of the cancellation. 7/

6/ Exh. C, an internal Husky memorandum, states as follows: "It appears that in the North-Embar Tensleep area, 24.61% of USGS royalty has been sold to Wyoming Refining Company from July 1, 1980 to present." This fact is corroborated by Exh. B, Husky's work sheets, which contain a notation referring to "Wyo Ref .2461," and which show that a deduction of 24.61 percent was taken from the amount of royalty in value due for the months after June 1980.

Marathon's material also discloses that another purchase contract, No. 14-08-0001-18188, went into effect on June 1, 1980, under which Husky acted on behalf of the Government to receive royalty in kind oil from properties in Colorado, North Dakota, and Wyoming, including some properties previously covered by contract No. 14-08-0001-14344 (Additional SOR, Exh. D: GS letter dated Apr. 30, 1980). However, it does not appear that the NET property was covered by this royalty in kind purchase contract.

7/ This statement appears to be partially in error, in that (as noted above) the Aug. 1, 1980, letter from USGS did not advise of the cancellation of the contract to take royalty in kind effective June 1, 1980, but rather of the initiation of another such contract, No. 14-08-0001-18190, with Little America Refining Co., effective Sept. 1, 1980.

Copies of these letters were received from Allen Jolley as attachments to his aforementioned memos.

In view of these letters from the USGS, payment should immediately be made to the USGS * * * for oil taken by Husky that should have been paid in value.
8/

* * * * *

Please make payment accordingly.

(Additional SOR, Exh. C). The copies of the letters that were attached to Allen Jolley's memo were addressed to Marathon, not to Husky.

From this documentation, Marathon infers that Husky did not receive notification that the Government had altered the contracts under which it was taking royalty oil in kind from various properties in the Oregon Basin until around the middle of October 1981 via receipt of letters addressed to other companies. At that time, Husky began an investigation which culminated in the January 1982 adjustments. Marathon specifically concludes that Husky's late payment resulted from Husky's "receiving delayed notification of the termination of a royalty in kind contract," which (it argues) amounts to justification for late payment, such that no interest should be assessed (Additional SOR at 5).

In its answer, MMS counters that Husky was timely informed of the termination of royalty in kind contract No. 14-08-0001-14344 with Little America, indicating that the Area Oil and Gas Supervisor, GS, sent a letter dated April 25, 1980, in which he stated that that contract was to be terminated "effective at 7:00 A.M., June 1, 1980." MMS enclosed a copy of this letter -- the same one submitted by Marathon as an exhibit to its supplemental SOR -- which shows that Husky is included on the list of addressees. MMS states that, under the presumption of regularity, it is assumed in the absence of clear evidence to the contrary that public officers have properly discharged their official acts.

[1] Under section 103(b) of FOGRMA, 30 U.S.C. § 1713(b) (1988), records required by the Department with respect to oil and gas leases from Federal lands must be maintained by Federal lessees for 6 years after the records are generated, unless the Department notifies the record holder that

fn. 7 (continued)

The reference to a letter from GS dated May 25, 1980, is apparently incorrect, as Marathon has not provided such letter. The reference is probably to the Apr. 25, 1980, letter.

8/ The memo also refers specifically to "take-in-kind oil purchased by Husky effective June 1, 1980, under contract No. 14-08-0001-18188," which evidently did not affect the leases involved here. It appears that Husky also made adjusted payments on another property, referred to in the memorandum as "the North Madison Area," that was affected by that contract.

an audit or investigation involving such records has been initiated and that such records must be maintained for a longer period. Where an audit or investigation is underway, records shall be maintained until the Department releases the record holder of the obligation to maintain such records. We regard this section as providing that lease records need be maintained by a Federal lessee for only 6 years after the records are generated, unless the lessee has been notified prior to that time of an audit.

Marathon has alleged, without challenge by MMS, that it was not informed of the initiation of the audit by the State of Wyoming until after March 22, 1988, more than 6 years after the time period involved here. Therefore, Marathon, as Husky's successor in interest, may not be faulted for failing to prove facts based on documentation generated prior to March 22, 1982, at the earliest. As noted below, in order to prevail, some showing of justification must be made. However, if the statutory safeguard provided by section 103(b) of FOGDRA is to have any meaning, there must be limits on how precise the details of such showing must be, as it may be impossible for the lessee to make convincing proof that grounds existed for relief if exonerating documentation has become unavailable.

MMS argues that there is no doubt as to the circumstances presented by this dispute, so that the institution of the audit and collection proceeding more than 6 years after relevant documentation was generated is irrelevant. We agree that, in order to prevail, a lessee must show that documentation that would prove its entitlement to relief is unavailable. ^{9/}

[2] Here, Marathon originally asserted in its SOR that GS' failure to collect late payment charges at the time of the late payments indicates that they were excused, and that lost documents would prove its entitlement to relief. Specifically, Marathon indicated that there was probably a letter from Husky, now lost, that accompanied the late payment explaining the reason for it.

We need not consider whether such showing might have sufficed in view of the passage of more than 6 years, as the documentation that Marathon was able to find (and which it provided in its Additional SOR), along with that provided by MMS, affords a plausible explanation for what apparently happened and allows us to affirm the imposition of late payment charges.

We are persuaded that Husky was timely notified by GS in April 1980 of the impending cancellation of the royalty in kind contract, and that royalty in value payments would have to commence for production in June 1980 and thereafter. Despite Marathon's suggestion that Husky did not receive this timely notice, MMS has shown that it was mailed to Husky, which is adequate to create the presumption that it was received. See Bernard S. Storper,

^{9/} To hold otherwise would be to render sec. 103(b) of FOGDRA as a statutory bar to all claims relating to facts occurring more than 6 years prior to the institution of an audit. This we decline to do. See United States v. Tri-No Enterprises, 819 F.2d 154, 158-59 (7th Cir. 1987).

60 IBLA 67, 70 (1981); Donald E. Jordan, 35 IBLA 290, 294 (1978). Departmental regulation 30 CFR 225.8 (1979) provided that where a determination was made to terminate the delivery of royalty in kind, GS was required, if practicable, to give any affected lessee or operator notice of the change at least 30 days in advance. Thus, the April 25, 1980, letter appears to have complied with this requirement.

Marathon's documentation shows that some of Husky's employees, evidently those responsible for issuing Husky's payments for the royalty, did not become aware that royalty in value had been due until October 1981, at which time Alan Jolley, evidently another Husky employee, provided copies of the GS letters concerning changes in royalty in kind contracts and asked them to review Husky's files to confirm that payment should be made to GS. Evidently, they did not do so immediately, as Jolley repeated his request by telephone on January 7, 1982. At that time, they reviewed their files and found Jolley's October 1981 memo, but could find no record in Husky's Division Order of receiving the April 25, 1980, letter from GS (among others). They then processed the paperwork necessary to calculate and pay the royalty in value that had been due.

In view of MMS' proof that Husky was informed of the cancellation of the royalty-in-kind arrangement, we are unable to conclude that the failure to pay timely was justified. It appears that the failure to make the appropriate changes in royalty payment resulting from the cancellation of the royalty in kind contracts resulted not from lack of notice from GS, but from confusion in Husky's accounting department, as is evident from the documents that Marathon located. 10/

Nor are we persuaded to hold that MMS' claim is barred by statutes of limitation or by the doctrine of laches. We have previously held that statutes of limitation apply to judicial enforcement of administrative actions, but not to the administrative actions themselves. See S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5 (Fed. Cir. 1985); Alaska Statebank, 111 IBLA 300, 311-12. It is not within our authority to decide whether the statutes of limitations would bar a judicial suit to collect royalty deemed owing on a lease. Such determination would be made by the court before which any collection proceeding is brought. Alaska Statebank, supra at 312. It is well established that the doctrine of laches

10/ We are aware that MMS has not shown that GS sent copies of other notices concerning changes in the royalty-in-kind arrangements. Since Husky did receive notice that, after June 1, 1980, "royalty will be payable in value rather than in kind," its failure to pay royalty in value after that date cannot be justified on the grounds that it was unaware that royalty in kind was no longer being taken. Of course, Marathon should pay a late payment penalty only insofar as the actual amount due (which was reduced by the amount of the royalty in kind that was taken from the leases) was not timely paid. It appears that MMS properly calculated the actual amount that was due each month, duly taking into account the royalty in kind that was collected.

cannot be used to preclude the United States from enforcing a public right or protecting a public interest. See United States v. State of California, 332 U.S. 19, 40 (1947); United States v. Wilson, 38 IBLA 305, 307-08 (1978).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

APPENDIX

IBLA 89-434 (MMS 88-0229-O&G; MMS Order to Pay dated May 25, 1988):

<u>Lease Number</u>	<u>Late Royalty Payment</u>	<u>Late Payment Interest</u>
49-031697	\$ 91,112.16	\$ 8,433.54
64-043965-A	124,793.70	11,325.48
64-044026-A	360,572.58	33,004.50
64-044036-B	26,043.63	2,378.82
64-066531	136,674.99	12,650.99
64-079111	32,367.37	2,971.56

Total: \$ 70,764.89

IBLA 90-2 (MMS 88-0215-O&G; MMS Order to Pay dated May 23, 1988):

<u>Lease Number</u>	<u>Late Royalty Payment</u>	<u>Late Payment Interest</u>
64-044333-A	\$ 4,690.75	\$ 435.26
64-043966-A	673,236.50	61,310.25

Total: \$ 61,745.51

